IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 11TH JANUARY 2007 / 21ST PAUSHA 1928

FAO.No. 252 of 2006()

AGAINST THE ORDER DATED 08/10/2003 IN IA.1814/03 IN
AS.15/1986 of SUB COURT, OTTAPPALAM

APPELLANTS/PETITIONERS:APPELLANTS:
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1. SANKARAN (DIED) VELIPPARA,
   ELAMBULASSERI AMSOM AND DESOM, OTTAPALAM TALUK,
   PALAKKAD DISTRICT.

2. LAKSHMI, W/O. SANKARAN,
   VELIPPARA, ELAMBULASSERI AMSOM AND DESOM,
   OTTAPALAM TALUK, PALAKKAD DISTRICT.

3. RAJAN, S/O. SANKARAN,
   VELIPPARA, ELAMBULASSERI AMSOM AND DESOM,
   OTTAPALAM TALUK, PALAKKAD DISTRICT.

4. KUMARI, D/O. SANKARAN,
   VELIPPARA, ELAMBULASSERI AMSOM AND DESOM,
   OTTAPALAM TALUK, PALAKKAD DISTRICT.

5. SUSHEELA, D/O. SANKARAN,
   VELIPPARA, ELAMBULASSERI AMSOM AND DESOM,
   OTTAPALAM TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.S.SANTHOSH

RESPONDENTS: RESPONDENTS:
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1. DEVAKI AMMA (DIED),
   D/O. NJARAKKATTIL SREEDEVI AMMA,ELAMBULASSERY P.O.
   (VIA) KARAKURISSI, PALAKKAD DISTRICT-678 752.

2. PRABHAKARAN NAIR, S/O.LATE DEVAKI AMMA,
AGED 62 YEARS,ELAMBULASSERY P.O.,(VIA) KARAKURISSI
PALAKKAD DISTRICT-678 752.

3. VIJAYAN, S/O. LATE DEVAKI AMMA,
AGED 58 YEARS, ELAMBULASSERY P.O.,(VIA)KARAKURISSI
PALAKKAD DISTRICT-678 752.

4. VINOD, S/O. LATE DEVAKI AMMA,
AGED 54 YEARS, ELAMBULASSERY P.O.,(VIA)KARAKURISSI
PALAKKAD DISTRICT-678 752.

5. SATHEESAN, S/O.LATE DEVAKI AMMA,
AGED 50 YEARS, ELAMBULASSERY P.O.,(VIA)KARAKURISSI
PALAKKAD DISTRICT-678 752.

R2 TO R5 BY ADV. SRI.V.N.ACHUTHA KURUP (SR.)
SRI.B.S.SWATHY KUMAR
1. SMT.BINDU SREEKUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 8/1/2007, ALONG WITH WPC NO. 16120 OF 2006 THE COURT ON 11/01/2007, DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

F.A.O.NO. 252 OF 2006

and

W.P.(C) NO. 16120 OF 2006

Dated this the 11th day of January,2007

JUDGMENT

Defendants in a suit filed by the predecessor-in-interest of the respondents herein for recovery of possession, are the appellants in the F.A.O and the petitioners in the Writ Petition. The F.A.O is filed challenging the order dismissing the application for setting aside abatement of the appeal before the Lower Appellate Court, caused on account of the failure to implead the legal representatives of the deceased respondent (plaintiff) in the Appeal within time. The Writ Petition is filed challenging the orders dismissing the application for impleading the legal representatives of the original plaintiff and the application for condoning the delay.

2. The suit was decreed by the trial court and the decree was confirmed in appeal by the Lower

Appellate Court. In S.A.No.810 of 1991 filed by the defendants, a remand was made to the Lower Appellate Court with a direction to decide afresh the plea of adverse possession and limitation raised by the first defendant in the suit. The Second Appeal was allowed and remand was made on 12.12.2001. The sole respondent in the Appeal, the predecessor-in-interest of the respondents herein, died on 22.2.2003. On 8.7.2003, the appellants before the Lower Appellate Court (defendants) filed I.A.No.1285 of 2003 to implead the legal representatives of the deceased plaintiff. On 23.9.2003, the appellants/defendants filed I.A.No.1808 of 2003 to condone the delay in filing the application for impleading. On 24.9.2003, I.A.No.1814 of 2003 was filed by the appellants/defendants to set aside the abatement. On 8.10.2003, the court below dismissed I.A.No.1814 of 2003 (application to set aside abatement). The order reads thus:

> "Heard both sides. This application filed out of time. No application filed to condone delay. Hence IA dismissed."

On the same date, the court below dismissed the application for impleading. The order reads as follows:

> "Heard both sides. I.A.Nos.1814/03 and 1808/03 dismissed. Hence this IA dismissed."

On 8.10.2003 itself, I.A.No.1808 of 2003 (application to condone delay) was dismissed in the following manner:

> "Heard both sides. Sec.5 of the Limitation Act is not applicable in such a case. Hence IA dismissed."

On 13.10.2005, the court below dismissed the appeal. The judgment reads thus:

> "Appeal against the decree and judgment of the Munsiff of Ottapalam, dated 21st December, 1985 in OS.88/84.
>
> Only one respondent. He died. No steps taken. Appeal is dismissed as abated."

3. Sri.V.N.Achutha Kurup, learned Senior Counsel appearing for the respondents/plaintiffs, raised a preliminary objection that since the appellants/

defendants have not challenged the judgment dated 13.10.2005, the F.A.O and the Writ Petition are not maintainable. He also submitted that no sufficient reasons are stated in the affidavit filed in support of the application for impleading or for setting aside the abatement or for condoning the delay as to why the applications were not filed within time. Sri.Vinod Chandran, learned counsel for the appellants/ defendants, submitted that the F.A.O is maintainable under Order XLIII Rule 1(k) of the Code of Civil Procedure. He submitted that the judgment was passed subsequent to the filing of the F.A.O. If the orders dated 8.10.2003 are set aside, the appeal would automatically get revived and it is not necessary for the appellants/defendants to file a Second Appeal challenging the judgment of the Lower Appellate Court. The counsel also submitted that sufficient reasons are stated in the affidavit accompanying the application for condoning the delay explaining the reasons for the delay.

4. An order under Rule 9 of Order XXII of the Code of Civil Procedure refusing to set aside the abatement or dismissal of a suit is appealable under Order XLIII Rule 1 (k) of the Code of Civil Procedure. Rule 11 of Order XXII states that in the application of Order XXII to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal. Therefore, an order refusing to set aside abatement of Appeal is also appealable under Rule 1(k) of Order XLIII of the Code of Civil Procedure. The judgment was passed after filing of the F.A.O challenging the order in I.A.No.1814 of 2003. I am inclined to accept the contention of the appellants that it is not necessary for the appellants to file a Second Appeal challenging the judgment and that if the order refusing to set aside the abatement is reversed in the F.A.O, the appeal before the Lower Appellate Court would revive. Therefore, I overrule the preliminary objection raised by the learned counsel for the respondents.

5. The court below dismissed the application to set aside the abatement on the ground that no application was filed to condone the delay. This is not correct at all. An application was filed under Section 5 of the Limitation Act to condone the delay "in filing the application for impleading", though as per law, the prayer should be to condone the delay in filing the application for setting aside the abatement.

6. In view of Rule 11 of Order XXII of the Code of Civil Procedure, the provisions regarding abatement and setting aside abatement in respect of a suit shall apply to appeals as well. If the legal representatives of the deceased respondent in the appeal are not impleaded within ninety days as provided in Article 120 of the Limitation Act, the appeal would abate. Sub-rule (1) of Rule 4 of Order XXII of the Code of Civil Procedure provides that if one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and

the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-rule (3) of Rule 4 of Order XXII provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased plaintiff. Rule 9 of Order XXII reads thus:

> "9. Effect of abatement or dismissal:- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.
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> (3) The provisions of Sec.5 of the Indian Limitation Act, 1877 (15 of 1877), shall apply to application under sub-rule (2).
>
> Explanation:- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order."

It is also relevant to extract here Articles 120 and 121 of the Limitation Act:

THIRD DIVISION – APPLICATIONS

Description of application	Period of limitation	Time from which period begins to run
120. Under the Code of Civil Procedure, 1908 (5 of 1908), to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.
121. Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatement

7. If no application is made for impleading the legal representatives of the deceased plaintiff or appellant or defendant or respondent within ninety days, the consequence is that the suit or the appeal would abate. The plaintiff or appellant may apply for setting aside the abatement within sixty days from the date of abatement, as provided under Article 121 of the

Limitation Act. If an application for setting aside the abatement is made within 150 days of the date of death, there is no need to file an application under Section 5 of the Limitation Act to condone the delay, as no delay as such occurs in view of Articles 120 and 121 of the Limitation Act. Delay occurs on the expiry of 150 days from the date of death. If applications for impleading the legal representatives and for setting aside the abatement are filed after 150 days of the date of death, it is necessary to explain the delay in filing the application for setting aside the abatement. It is not the delay in filing the application for impleading that is to be explained by the applicant seeking to set aside the abatement. On the other hand, it is the delay in filing the application for setting aside the abatement that is to be explained. The words "the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Sec.5 of that Act" in clause (b) of

sub-rule (5) of Rule 4 of Order XXII of the Code of Civil Procedure would fortify this conclusion.

8. In **Kunhikayyumma and another** v. **Union of India and others** (AIR 1984 KERALA 184), it was held that if from the facts and circumstances of the case sufficient cause for the delay in seeking substitution of the legal representatives of the deceased party was obvious the Court would be justified in granting the relief ignoring the fact that the affidavit neither mentioned the cause nor prayed for setting aside the abatement. The prayer should be treated as being implicit in the application for impleading the legal representatives. This decision was followed in **Janaky** v. **Sasi and others** (1999 (2) K.L.J. 346).

9. In **Collector, Land Acquisition, Anantnag and another** v. **Mst.Katiji and others** (AIR 1987 SC 1353), the Supreme Court, while dealing with a case involving an application for condoning the delay in filing the appeal, held thus:

> "3. The legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on `merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. ..."

It was also held by the Supreme Court that it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice.

10. In **State of M.P.** v. **S.S.Akolkar** ((1996) 2 SCC 568), the Supreme Court drew a distinction between an application for condoning the delay in filing the appeal and an application for condoning the delay in setting aside the abatement and held thus:

> "It is settled law that the consideration for condonation of delay under Section 5 of the Limitation Act and setting aside of the abatement

> under Order 22 are entirely distinct and different. The court always liberally considers the latter, though in some case, the court may refuse to condone the delay under Section 5 in filing the appeals. ..."

11. In the matter of condoning the delay in filing an appeal, the appellant approaches the Court belatedly and he has to explain the reason why he filed the appeal belatedly. The successful party before the trial court would be under the belief that the defeated party would not file an appeal after the prescribed period of limitation. Sometimes, a plaintiff whose suit was decreed may file an application for execution after the expiry of the prescribed period for filing an Appeal. The party who has obtained a decree for declaration or for nullity of marriage or for divorce might alter his position after expiry of the period for filing the appeal. The position is different in the case of delay in filing an application for setting aside the abatement caused due to non-impleadment of the legal representatives of a deceased party within time. In such cases, the suit or appeal was already there and the parties were aware of the pendency of the

suit or appeal. Impleadment means substitution of the legal representatives of the deceased party. The delay in bringing on record the legal representatives of the deceased party is different from the delay in filing the appeal itself. The matters to be considered and the nature of the discretion to be exercised by the Court in the matter of condonation of delay in filing appeals are different from those to be considered and exercised in an application for condoning delay in setting aside abatement of a suit or Appeal. The prejudice that would be caused to the opposite party in the case of condoning the delay in setting aside abatement of a suit or Appeal would be of a lesser magnitude when compared to a case of condoning the delay in filing the Appeal. A party does not stand to gain by not taking steps to implead the legal representatives of the deceased party within time. As held by the Supreme Court in (1996) 2 SCC 568 the yardsticks to be applied and the discretion to be exercised are different in the case of an application for condoning the delay in filing an appeal and in the

case of an application for condoning the delay in setting aside abatement.

12. In the present case, the application for impleading was filed on 8.7.2003. Had the application for setting aside abatement also been filed on 8.7.2003, there was no necessity for filing an application for condoning delay since the period of limitation for filing an application to set aside the abatement expired only on 22.7.2003. The application to set aside abatement was not filed along with the application for impleading. The application to set aside the abatement was filed beyond the period prescribed for filing that application, which necessitated the filing of an application for condoning the delay. The court below dismissed the application for setting aside abatement on a ground which is quite unsustainable, the reason for dismissal being an incorrect statement that no application was filed to condone the delay. The court below did not properly comprehend the facts and dealt with the applications

mechanically. On going through the affidavit filed in support of the application for condoning the delay, I am satisfied that sufficient grounds are made out for setting aside the abatement and for condoning the delay in filing the application for setting aside the abatement. It is true that the appellants have stated in the application for condoning the delay that the delay in filing the application for impleading is to be condoned. Though technically speaking, this is not correct and the delay was occasioned for setting aside the abatement, taking a liberal approach, I am inclined to hold that the delay is liable to be condoned.

Accordingly, F.A.O and the Writ Petition are allowed and the orders impugned are set aside. I.A.Nos.1285 of 2003, 1808 of 2003 and 1814 of 2003 are allowed. Since these applications are allowed, necessarily, the judgment dated 13.10.2005 shall stand set aside since the appeal was dismissed only on account of abatement. The court below shall dispose of

the appeal on the merits within a period of three months.

(K.T.SANKARAN)
Judge

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